

NO. 87056-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NO. 294382

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROBERT CHANEY

Respondent,

v.

PROVIDENCE HEALTH CARE d/b/a SACRED HEART MEDICAL
CENTER & CHILDREN'S HOSPITAL

Petitioner.

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STATE OF WASHINGTON
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SUPPLEMENTAL BRIEFING BY RESPONDENT

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I. INTRODUCTION

This Court has granted Providence Health Care's petition for review. The issue presented is whether Providence Health Care ("Sacred Heart") was required to restore Robert Chaney to his position once his health care provider indicated he was fit-for-duty. Chaney should have been restored to his position based on his doctor's opinion. Sacred Heart could not make the decision whether to allow Chaney back to work based on its own assessment of his fitness. The Court of Appeal's decision should be affirmed.

II. LAW AND ARGUMENT

The right of reinstatement pursuant to 29 U.S.C. § 2614 (a)(1) is the "linchpin" of the interference or entitlement claim under the Family Medical Leave Act ("FMLA"). Sanders v. City of Newport, 657 F.3d 772, 778 (9th Cir. 2011). The protection of the employee's position affords the ability for an employee to take a medical leave for his serious health condition. Under an interference claim, the employer's intent is irrelevant for a determination of liability. 657 F.3d at 778.

The key piece of evidence in this matter is the medical certification by Mr. Chaney's doctor indicating that Chaney was fit to return to duty. (See

Ex. P45). As Division III ruled, the medical certification was a sufficient statement that Chaney was fit to return to work. Chaney v. Providence Health Care, 165 Wn. App. 578, 590, 267 P.3d 544 (2011). The intent of “Sacred Heart” is irrelevant. All that was necessary was Dr. Jamison’s statement that Chaney was “OK to work” The continuation of Dr. Jamison’s statement, “as soon as Employer allows” is of no consequence. Sacred Heart did not have discretion upon receiving Dr. Jamison’s certification. There is no substantial evidence or reasonable inference to sustain the jury’s verdict after considering Dr. Jamison’s written statement.

A. The Burden is on Sacred Heart

Sacred Heart argues that the Court of Appeals incorrectly placed the burden upon Sacred Heart to prove that Dr. Jamison’s certification was not inadequate. (Petition, pg 13 n.2). Under the FMLA, the burden is properly placed upon Sacred Heart.

The elements for an FMLA interference claim are: (1) The employee is eligible for FMLA protections; (2) the employer is subject to the FMLA; (3) the employee is entitled to FMLA leave; (4) the employee provided sufficient notice of intent to take leave; and (5) the employer denied the employee rights under the FMLA to which he was entitled. 657 F.3d at 778. The restoration of an employee is not absolute. The employee is not entitled to any additional rights or benefits other than those which the employee would have been entitled had the employee not taken leave. 29 U.S.C. §

2614 (a)(3)(B).

Pursuant to 29 C.F.R. § 825.214(b), if an employee is unable to perform the essential functions of his position because of a physical or mental condition, the employee has no right to restoration. Other regulations allow an employer to deny an employee restoration to his position. See 29 C.F.R. 825.216 (a)(1), (b), (c). However, the employer must be able to satisfy the following:

An employer must be able to show, when an employee requests restoration, that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment.

29 C.F.R. § 825.312 (d) (2007).

The burden is on the employer to show that it had a legitimate reason for denying reinstatement. Sanders v. City of Newport, 657 F.3d 772, 780 (9th Cir. 2011). The Ninth Circuit stated:

In light of the text of the pertinent DOL regulations, we conclude that when an employer seeks to establish that he has a legitimate reason to deny an employee reinstatement, the burden of proof on that issue rests with the employer. Thus, for example, if an employer denies an employee reinstatement on the ground that the employee cannot perform the essential functions of the employee's position, the burden of proof rests with the employer, not the employee.

657 F.3d at 780.

Sacred Heart had the burden to show that it had a legitimate reason to deny Chaney reinstatement. Determining Chaney's fitness-for-duty in

returning to work could not be based on Dr. Van Gerpen's information. Under the FMLA, the fitness-for-duty certification must be based on the opinion of the employee's health care provider. 29 C.F.R. § 825.310(c) (2007); see also Routes v. Henderson, 58 F. Supp.2d 959, 998 (S.D. Ind. 1999)(the employee's health care provider, not the employer's, determines whether employee is fit to return to work under FMLA). Sacred Heart had the burden to show that Dr. Jamison's statement and opinion were that Chaney was not fit for duty. As a matter of law, Dr. Jamison cleared Chaney for work and a return from FMLA leave on August 10, 2007. No reasonable juror could have determined otherwise.

B. Sacred Heart Understood Dr. Jamison's Position

The facts are undisputed that Sacred Heart understood the position of Dr. Jamison. Upon Dr. Van Gerpen's refusal to complete the FMLA certification, Sacred Heart's Laurie Morse responded in an e-mail regarding that news:

Well that's great! This Dr. VanGerpen is the one who restricted his ability to work. I'll be surprised if his own MD will complete it because I don't believe he agrees with the restriction . . . oh, it just gets more complicated!

(Ex. P44).

Ms. Morse did not just believe that Dr. Jamison had such an opinion-- she knew! Chaney had sought Dr. Jamison's intervention because he feared he would be terminated for taking Methadone. (RP 241-42). Dr. Jamison

spoke to a female in Sacred Heart's Human Resources department before Chaney's termination. (RP 242-43). Dr. Jamison told Sacred Heart's representative that Chaney could perform his job while on the medication. (RP 242). On July 5, 2007, Dr. Jamison's office sent a written release informing Sacred Heart that Chaney could safely perform his duties. (Ex. P25).

Consistent with his opinion, Dr. Jamison completed the Certification of Health Care Provider, a form provided by Sacred Heart. (Ex. P45). Being well versed with Chaney's difficulty with Sacred Heart, after indicating Chaney was fit for duty, Dr. Jamison continued, ". . . as soon as Employer allows." (Ex. 45; RP 268). Dr. Jamison could not give discretion to Sacred Heart under the FMLA. Sacred Heart was required to restore Chaney to his position after receiving Dr. Jamison's clearance.

C. The Incorrect Doctor's Opinion was Utilized

It is undisputed that Sacred Heart relied upon the opinion of Dr. Van Gerpen in determining that Chaney was not fit for duty to return to work from his FMLA leave. (RP 215; RP 299). In a letter dated August 27, 2007, Sacred Heart claimed that Dr. Van Gerpen's opinion was the only information it had concerning Chaney's ability to work. (Ex. 49). This statement has been proven to be false. It is undisputed that Sacred Heart had Dr. Jamison's certification. Sacred Heart chose to ignore Chaney's doctor's opinion.

When considering Chaney's motion for a directed verdict, the trial court clearly understood that there were no issues of fact concerning the critical issue for review. It was a battle of physician's opinions:

[F]irst of all we have the opinion of Dr. Van Gerpen that Mr. Chaney is not – he is fit for duty as an X-ray technician, I guess, but not as an intervening radiologist, radiological technician. As a result of that, Mr. Chaney gets a certification from Dr. Jamison, his personal physician, that he is fit to go back to work as soon as the employer will allow, is how he puts it. Which is a bit ambiguous, but be that as it may he says he is fit to go to work. So we have this situation where we have Dr. Van Gerpen saying one thing, Dr. Jamison saying another.

(RP 524). As the factual record indicates, Dr. Van Gerpen's opinion was the only factor preventing Chaney's return to work from FMLA leave. The trial court clearly understood that Chaney's health care provider indicated Chaney was fit for work. The trial court incorrectly applied the law and allowed this undisputed issue to go to the jury.

D. The Law and Regulations Applicable

Division III has provided a correct interpretation of the FMLA and its regulations. The only corrections needed for its opinion are the citations to the regulations. It appears that Division III was citing to the most current edition of the Code of Federal Regulations for the requirement that the employee provide a fitness-for-duty certification. See Chaney v. Providence Health Care, 165 Wn. App. 578, 587-88, 567 P.3d 544 (2011); 29 C.F.R. § 825.312 (2011). In his Answer to the Petition for Review, Chaney pointed

out that Sacred Heart was responsible for the confusion concerning the appropriate citations. Sacred Heart began the confusion with its Brief of Respondent. Sacred Heart cited to 29 C.F.R. § 825.312 as the applicable regulation allowing an employer to require a certification that the employee is able to resume work. Sacred Heart cited the July 1, 2009, or later edition of the Department of Labor's regulations. The critical facts for this case occurred in 2007. Therefore, the applicable regulations were those published and available during the summer of 2007.¹ Later revised regulations do not have retroactive effect. See Robbins v. Bureau of Nat. Affairs, Inc., 896 F. Supp. 18, 21-22 (1995) ("Regulations, like statutes, cannot be applied retroactively absent express direction to do so.") (citing Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)).

In 2007, 29 C.F.R. § 825.312 (b) pertained to circumstances where an employer could delay FMLA leave at the outset upon the failure of the employee to provide a medical certification for such leave. If the employee never produced a certification, the leave would not be FMLA leave. 29 C.F.R. § 825.312 (b) (2007).

1

During the summer of 2007, the regulations contained the language from the July 1, 2006, edition of Chapter V, of Title 29. The 2006 edition of Chapter V was reprinted in Title 29 of the Code of Federal Regulations, published on July 1, 2007. The 2006 edition would, once again, be reprinted in 2008. Sacred Heart's citations and references to the regulations begin to be consistent with the 2009 edition or later editions of Chapter V.

Sacred Heart utilized the language for a later edition of the § 825.312 to argue that the employee has an explicit duty to cooperate with the employer. (See Respondent's Brief, pg 37). The "employee cooperation" language appears in 2009 or later editions of Title 29 C.F.R. Sacred Heart invited the inaccurate citations by Division III.

The Court of Appeals quoted from 29 C.F.R. § 825.307(a) (2011). Division III stated: "[T]he employer may not request additional information from the health care provider." Chaney v. Providence Health Care, 165 Wn. App. 578, 588, 267 P.3d 544 (2011). The regulation in effect in 2007 has the same language but ends the phrase: ". . . from the employee's health care provider." 29 C.F.R. § 825.307(a) (2007)(emphasis added).

Although having later citations to the regulations, the Court of Appeals was interpreting the same language contained in the 2007 regulations. The Court of Appeals, though citing § 825.312 (b), referred to the language describing the fitness-for-duty certification as "a simple statement that an employee is able to resume work." See Chaney, 165 Wn. App. at 589-90 (language from 29 C.F.R. § 825.310 (c) (2007)). Describing the fitness-for-duty regulation in such a manner is not contained in 29 C.F.R. § 825.312 (b) (2011). The case law cited by Division III concerns the "simple statement" language found in 29 C.F.R. § 825.310 (c) (2007). See Brumbalough v. Camelot Care Centers, Inc., 427 F.3d 996, 1003 (6th Cir. 2005); Harrell v. U. S. Postal Service, 415 F.3d 700, 711, (7th Cir. 2005),

modified on reh'g on other grounds, 445 F.3d 913, 920-21 (6th Cir. 2006); Albert v. Runyon, 6 F. Supp.2d 57, 62-63 (D. Mass. 1998). The Court of Appeals properly applied 29 C.F.R. § 825.310(c) (2007).

E. Certification referred to Condition at End of FMLA Leave

Sacred Heart has attempted to muddy the waters concerning Dr. Jamison's medical certification. In its Petition for Review, Sacred Heart claims that Dr. Jamison wrote that Chaney needed two to four weeks of continuous leave from the date that the certification was signed, August 10, 2007. (Pet. Rev., pp. 8-10, 12).

Sacred Heart cites case law indicating that the medical certification must attest to the employee's condition at the time FMLA leave is concluded. However, an employee is not required to exhaust FMLA leave before returning to work. In Brumbalough v. Camelot Care Centers, Inc., a case cited by Sacred Heart, the plaintiff's leave commenced on June 11, 2001. 427 F.3d at 998. The 12 week leave period was to end September 11, 2001, if the full leave entitlement was needed. 427 F.3d at 998-99. 1003 (6th Cir. 2005).

The plaintiff claimed that she faxed her doctor's note on August 3, 2001. The doctor's note stated that the plaintiff "may return to work on 8/13/01[.] She should only work a 40-45 hour work week and limit her out of town travel to 1 day per week." 427 F.3d at 1003. The Sixth Circuit held, as a matter of law, that such language satisfied 29 C.F.R. § 825.310(c) as a

fitness-for-duty certification. 427 F.3d at 1004. This triggered the employer's duty to restore the plaintiff to her position. 427 F.3d at 1004.

Although the plaintiff was eligible for FMLA leave until September 11, 2001, with a medical certification indicating she was fit-for-duty, she could return on August 13, 2001, one month before exhaustion of her leave. 427 F.3d at 1004. Likewise, Chaney was entitled to FMLA leave until August 27, 2007. (See Ex. P36). Chaney's doctor provided a medical certification indicating Chaney could return to work on August 10, 2007. (Ex. 45).

In Barnes v. Ethan Allen, Inc., 356 F. Supp.2d 1306 (S.D. Fla., 2005), *aff'd*, 149 Fed. Appx. 845 (11th Cir. 2005), another case cited by Sacred Heart, the plaintiff employee provided a doctor's note which stated that the plaintiff could return to work in 4-6 weeks. The certification was not "relevant to the employees' (sic) condition at the time FMLA leave [was] concluded." 356 F. Supp.2d at 1312 (modification of verb tense). Sacred Heart also cites Burkett v. Beaulieu Group, LLC, 382 F. Supp.2d 1376 (N.D. Ga. 2005), *aff'd*, 168 Fed. Appx. 895 (11th Cir. 2006), for support that an employee's medical certification must pertain to the employee's condition that is contemporaneous with the employee's return to work. In Burkett, the employee's doctor "'estimated' that the 'probable duration' of the plaintiff's illness" would be about two weeks. 382 F. Supp.2d at 1381. The note did not indicate that the plaintiff was able to work at the time and did not provide

a specific date for the employee's return. 382 F. Supp.2d at 1381. The note did not satisfy 29 C.F.R. § 825.310(c).

Sacred Heart makes the claim that these cases are analogous to the case at bar. A look at the evidence shows, clearly, that such cases are inapposite.

The period of leave requested by Chaney began on July 16, 2007. (Ex. P46). The certification completed by Dr. Jamison indicates that Chaney required only two to four weeks of continuous leave. (Ex. P45). Dr. Jamison signed the medical certification, stating that Chaney was "fit for duty" on August 10, 2007. (RP 268; Ex. P45). July 16, 2007, was a Monday. August 10, 2007, a Friday, was the end of the fourth week after Chaney's FMLA leave began. Dr. Jamison was never contacted by Sacred Heart for clarification. (RP 241; Ex. P49). Dr. Jamison's fit for duty certification was contemporaneous with the end of Chaney's FMLA leave. Such leave ended on August 10, 2007.

Division III considered Dr. Jamison's certification and agreed. It understood that Dr. Jamison was evaluating Chaney's condition on August 10, 2007. Chaney should have been allowed to return to work and his FMLA leave should have concluded on August 10, 2007. 165 Wn. App. at 591.

III. CONCLUSION

Dr. Jamison's certification was all that could be considered for returning Chaney to work. See 29 U.S.C. § 2614 (a)(4); 29 C.F.R. § 825.310

(c)(2007). Sacred Heart had the burden to show that Dr. Jamison's medical certification did not indicate Chaney was fit for work. Sanders v. City of Newport, 657 F.3d 772, 780 (9th Cir. 2011). It is undisputed that Dr. Jamison cleared Chaney to return to work. Discretion could not be given to Sacred Heart. The Court of Appeals decision, reversing the trial court's denial of Chaney's motion for directed verdict, should be affirmed.

Respectfully submitted this 9th day of August, 2012.

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